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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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L.P.A 497/2017 & CM 26271/2017 (stay)

NORTH DELHI MUNICIPAL CORPORATION Appellant

Through: Ms. Saroj Bidawat, Advocate.

versus

KRISHAN KUMAR

.... Respondent

Through: Ms. Megha De, Advocate.

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE SANJEEV NARULA**

ORDER

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31.10.2018

SANJEEV NARULA, J

1. The Appellant–North Delhi Municipal Corporation has preferred the present appeal under Clause 10 of the Letters Patent Appeal read with Delhi High Court Rules assailing judgment dated 27th November, 2015 passed by the learned Single Judge in W.P.(C) 5513/2004 upholding the award passed by the Labour Court.

Background

2. Briefly stated the facts of the case are that the respondent-workman i.e. Sh. Krishan Kumar joined the employment of Municipal Corporation of Delhi (now North Delhi Municipal Corporation) as Mortarman w.e.f 15th March, 1989 as a daily muster roll worker.

3. The respondent-workman alleges that he continued in the employment of the Appellant till 15th May, 1993 on which date, without assigning any reasons his services were terminated. Appellant on the other hand contends that the services of the respondent-workman were never terminated by the Management and that he on his own stopped reporting to duty on 14th May 1993.

4. The respondent-workman raised an industrial dispute and vide reference dated 11th July, 1995 the same was referred by the Secretary (Labour) Government of NCT of Delhi to the Presiding Officer, Labour Court, IX, Karkardooma, Delhi (hereinafter referred to as 'Labour Court'), Industrial Adjudicator for its adjudication.

5. The parties appeared before the Labour Court and filed their respective pleadings. Issues were framed and both the parties led evidence and in pursuance thereto, the Labour Court passed the Award dated 7th July, 2003 ordering reinstatement of the respondent workman with full back wages.

6. The Appellant-Management challenged the Award by way of Writ Petition bearing No. W.P (C) 5513/2004.

Concurrent finding of facts

7. The learned Single Judge examined the pleadings of the parties and concurred with the findings of the Labour Court that the Appellant had not specifically denied that the workman has completed 240 days

of continuous service in the relevant year. The learned Single Judge has also noted and agreed with the Labour Court that the muster roll produced by the Appellant was an incomplete document. Both, the Labour Court as well as Learned Single Judge have thus concluded that respondent had completed 240 days of continuous service during the relevant year and he acquired the status of 'workman' within the meaning of the Section 2 (s) of the Industrial Disputes Act, 1947.

CM No. 26272/2017 (application for condonation of delay)

8. Before examining the merits of the case, it is to be noted that there is an inordinate delay of 550 days on the part of the Appellant in filing the present appeal.

9. The aforesaid delay is sought to be explained as under:-

“2. That after passing of the judgement, counsel sent the copy of the judgment after receiving it from the registry along with the opinion for challenging the same.

3. That the said judgment with opinion got misplaced. The reason may be that the said writ was filed when MCD was not trifurcated. After trifurcation files were distributed zone wise and because of some misunderstanding counsel letter with judgment may have been forwarded to wrong zone.

4. That in the meanwhile the workman filed an application u/s 33-C for the recovery of the back wages from 01.01.2012 to 31.01.2016.

5. That the management came to know about the judgment dated 27.11.2015, when they received the recovery case file along with the copy of court orders on 16.02.2017 from their counsel before the Labour

Commissioner.

6. That the management immediately forwarded the file to higher authorities for taking their advise for further action in the said matter.

7. That in May 2017, the officers of the Corporation after taking approval from higher authorities contacted the counsel and directed to file LPA challenging the judgement dated 27.11.2015.

8. That the accompanying LPA could not be filed during the stipulated time because of the reason that the copy of the judgment dated 27.11.2015 did not reach to the concerned division, it may have been marked to some other division/officers inadvertently, not related to the instant matter, due to which, the matter could not be taken up for challenge before the Hon'ble Court in due course of time."

10. The aforesaid grounds and reasons seeking condonation of delay do not inspire any confidence. The explanation is frivolous, vague and inexact. There is also no documentary evidence annexed with the application in support of the alleged reasons. The application also does not give any time line or the details/dates of the movement of the file at the end of the Appellant. The attempt to explain the delay stating that the Management came to know about the impugned judgment on 16th February 2017 when they received the recovery case file along with the copy of the court order from the respondent's counsel, is facetious to say the least.

11. There is no explanation whatsoever as to what transpired prior to 16th February, 2017. The Appellant-Management cannot justify the delay by taking shelter of the plea that the opinion on the judgment

sought from the counsel, when received, was misplaced. Further, the plea of trifurcation of the Municipal Corporation of Delhi can also not justify the gross delay. The plea of misunderstanding between the Appellant-Management and its counsel, cited as one of the reasons for delay, is also completely bereft of merits.

12. The Hon'ble Supreme Court in the case of ***Postmaster General and Others vs. Living Media India Limited and Anr***, (2012) 3 SCC 563 has held as under:-

“In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bonafide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red-tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few.”

13. The Appellant-management being a Corporation is expected to act diligently. The entire explanation for seeking condonation of delay shows a casual and lackadaisical approach that cannot be countenanced. Therefore, the explanation of departmental delay on part of the Appellant deserves to be discredited. The application seeking condonation of delay does not warrant any leniency. Accordingly, the application is dismissed.

Submission on Merits

14. Though the present appeal is being dismissed on the ground of delay, yet this Court is proceeding to examine the merits of the contentions of the parties.

15. The learned counsel for the Appellant-Management has submitted that the respondent-workman was not employed on a regular basis and was only engaged as a daily wage beldar and therefore, was not entitled to any benefits of a regular employee.

16. It is further submitted that the workman continued in the employment till 14th May, 1993, on which date without assigning any reason, he absented himself from duty willfully and failed to notify the Appellant-Management.

17. Relying upon exhibit marked as Ex. MW 1/1 (muster roll), the learned counsel for the Appellant has contended that the respondent had not completed 240 days of continuous service in the relevant year, therefore, the Industrial Adjudicator had arrived at a wrong finding of fact. It has been further submitted that it was for the respondent-workman to show that he had completed more than 240 days in the relevant year.

18. The learned counsel also relied upon judgments of the Supreme Court in the case of *Asst. Engineer, Rajasthan Development*

Corporation v. Gitam Singh, 2013 (5) SCC 136. This judgment deals with the question as to whether the Court should grant the relief of reinstatement, when the workman has been employed as a daily wager in absence of a regular vacancy. This issue is dealt with in the succeeding paragraphs.

19. On the other hand, learned counsel for the respondent has relied upon the findings of the learned Single Judge and has contended that the action of the Management is violative of Section 25-F of the Industrial Disputes Act, 1947. Respondent's counsel relying on the judgment of the Supreme Court in *L.Robert D'Souza v. The Executive Engineer Southern Railway (1982) 1 SCC 645*, has argued that it is a settled proposition of law that Section 25- F of the Industrial Disputes Act, 1947 is also applicable to a daily wage worker. She has therefore, urged that the termination of service of a workman would constitute retrenchment and for non-compliance with the pre-condition to valid retrenchment, the termination in the present case would be illegal and invalid.

Analysis and findings

20. The scope of the present appeal is indeed a narrow one. The short question before this Court is that whether the workman had completed 240 days of continuous service in the relevant year and if so, the consequences thereof.

21. The law with respect to applicability of section 25-F to a daily-

rated worker is settled as noted above in the case of **L. Robert D'Souza** (*supra*) wherein it has been held as under :

“27.Therefore, assuming that he was a daily-rated worker, once he has rendered continuous uninterrupted service for a period of one year or more, within the meaning of Section 25-F of the Act and his service is terminated for any reason whatsoever and the case does not fall in any of the excepted categories, notwithstanding the fact that Rule 2505 would be attracted, it would have to be read subject to the provisions of the Act, Accordingly, the termination of service in this case would constitute retrenchment and for not complying with pre-conditions to valid retrenchment, the order of termination would be illegal and invalid.”

22. The question as to whether the respondent-workman indeed completed 240 days in the relevant year is, purely a question of fact. The Appellant claims that the respondent did not work for 240 days in the relevant year. The burden of proof on this count was on the Appellant. The Appellant endeavoured to discharge the burden by producing its witness MW-1 (Assistant Engineer of the Appellant) who produced a copy of the summary of the muster roll. The Labour Court examined the testimony of MW-1 and gave a finding that the record of the muster roll produced before the Court was incomplete and was deliberately withheld by the Management and thus, Ex. MW 1/1 was discredited.

23. It was for the Appellant to produce the complete record and in absence thereof, the presumption has to be drawn against the Appellant.

24. On this issue, the observation of the Supreme Court in the case of *Municipal Corporation, Faridabad v. Siri Niwas*, (2004) 8 SCC 195 is as under:-

“A Court of Law even in a case where provisions of the Indian Evidence Act apply, may presume or may not presume that if a party despite possession of the best evidence had not produced the same, it would have gone against this contentions. The matter, however, would be different where despite direction by a court the evidence is withheld.”

25. We have given our anxious consideration to the submissions of parties and the findings of fact of the Labour Court. We find no reason to revisit the findings of fact while exercising jurisdiction in intra-court appeal. It is hardly required to state that the scope of intra-court appeal would be normally limited to matters involving the exercise of discretion in a perverse manner or where the order may result in serious injustice or miscarriage of justice.

26. Once the Court has arrived at a finding of fact that the status of the respondent is that of a ‘workman’, the necessary sequitur is that the respondent is entitled to the protection as provided under the Act. Admittedly, no notice for termination was given by the Appellant to the respondent as is the mandatory requirement under Section 25-F of the Act. There is no documentary evidence shown to us which can even remotely suggest that the respondent abandoned the services of the Appellant. Therefore, the plea of abandonment is *ex-facie* without

any merit.

27. The Hon'ble Supreme Court in the case of ***G.T. Lad and Ors v. Chemical and Fibres of India Ltd***, AIR 1979 SC 582 has expounded and explained the meaning of 'abandonment' in Industrial Law. The relevant paragraphs have been reproduced herein below:-

“6. Re. Question No. 1: In the Act, we do not find any definition of the expression 'abandonment of service'. In the absence of any clue as to the meaning of the said expression, we have to depend on meaning assigned to it in the dictionary of English language. In the unabridged edition of the Random House Dictionary, the word 'abandon' has been explained as meaning 'to leave completely and finally; forsake utterly; to relinquish, renounce; to give up all concern in something'. According to the Dictionary of English Law by Earl Jowitt (1959 edition) 'abandonment' means 'relinquishment of an interest or claim'. According to Blacks Law Dictionary 'abandonment' when used in relation to an office means 'voluntary relinquishment. It must be total and under such circumstances as clearly to indicate an absolute relinquishment. The failure to perform the duties pertaining to the office must be with actual or imputed intention, on the part of the officer to abandon and relinquish the office. The intention may be inferred from the acts and conduct of the party, and is a question of fact. Temporary absence is not ordinarily sufficient to constitute an abandonment of office'.

7. From the connotations reproduced above it clearly follows that to constitute abandonment, there must be total or complete giving up of duties so as to indicate

an intention not to resume the same. In Buckingham Co. v. Venkatiah and Ors. it was observed by this Court that under common law an inference that an employee has abandoned or relinquished service is not easily drawn unless from the length of absence and from other surrounding circumstances an inference to that effect can be legitimately drawn and it can be assumed that the employee intended to abandon service. Abandonment or relinquishment of service is always a question of intention, and normally, such an intention cannot be attributed to an employee without adequate evidence in that behalf. Thus, whether there has been a voluntary abandonment of service or not is a question of fact which has to be determined in the light of the surrounding circumstances of each case.”

28. Therefore, it has been rightly held that the termination of the respondent is invalid. The Learned Single Judge has rightly concluded that the termination of the respondent's services is contrary to the provisions of the Industrial Disputes Act, 1947.

Relief

29. The only issue which invites this Court's interference is with respect to the relief to be granted to the respondent-workman.

30. The labour court has passed an award reinstating the workman with full back wages. The Appellant-management relying on *Asst. Engineer, Rajasthan Development Corporation (supra), Jagbeer Singh v. Haryana State Agriculture Marketing Board, 2009 15 SCC*

327, New Delhi Municipal Council v. Nanak Chand 2015 (1) SCT 456 (Delhi) and Hari Nandan Prasad v. Employer I/R to Management of FCI, AIR (2014) SC 1848 has contended that instead of reinstatement, the Labour Court ought to have awarded compensation.

31. In *Asst. Engineer, Rajasthan Development Corporation (supra)*, the Hon'ble Supreme Court has held as under :-

“26. From the long line of cases indicated above, it can be said without any fear of contradiction that this Court has not held as an absolute proposition that in cases of wrongful dismissal, the dismissed employee is entitled to reinstatement in all situations. It has always been the view of this Court that there could be circumstance(s) in a case which may make it inexpedient to order reinstatement. Therefore, the normal rule that dismissed employee is entitled to reinstatement in cases of wrongful dismissal has been held to be not without exception. Insofar as wrongful termination of daily-rated workers is concerned, this Court has laid down that consequential relief would depend on host of factors, namely, manner and method of appointment, nature of employment and length of service. Where the length of engagement as daily wager has not been long, award of reinstatement should not follow and rather compensation should be directed to be paid. A distinction has been drawn between a daily wager and an employee holding the regular post for the purposes of consequential relief.”

32. In ***Jagbeer Singh v. Haryana State Agriculture Marketing Board, (2009) 15 SCC 327*** the Hon'ble Supreme Court has held as under:-

“14. It would be, thus, seen that by a catena of decisions in recent time, this Court has clearly laid down that an order of retrenchment passed in violation of Section 25-F although may be set aside but an award of reinstatement should not, however, be automatically passed. The award of reinstatement with full back wages in a case where the workman has completed 240 days of work in a year preceding the date of termination, particularly, daily wagers has not been found to be proper by this Court and instead compensation has been awarded. This Court has distinguished between a daily wager who does not hold a post and a permanent employee.”

33. In ***New Delhi Municipal Council v. Nanak Chand*** 2015 (1) SCT 456 (Delhi), the Hon’ble Supreme Court held as under:-

“It is clear from the reading of the aforesaid judgments that the ordinary principle of grant of reinstatement with full back wages, when the termination is found to be illegal is not applied mechanically in all cases. While that may be a position where services of a regular/permanent workman are terminated illegally and/or malafide and/or by way of victimization, unfair labour practice etc. However, when it comes to the case of termination of a daily wage worker and where the termination is found illegal because of procedural defect, namely in violation of Section 25-F of the Industrial Disputes Act, this Court is consistent in taking the view in such cases reinstatement with back wages is not automatic and instead the workman should be given monetary compensation which will meet the ends of justice. Rationale for shifting in this direction is obvious.”

34. In ***Hari Nandan Prasad v. Employer I/R to Management of FCI***, AIR (2914) SC 1848 the Hon’ble Supreme Court has held as under:-

“It is true that the earlier view of this Court articulated in many decision reflected the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, there has been a shift in the legal position and in a long line of cases, this Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is in contravention of the prescribed procedure. Compensation instead of reinstatement has been held to meet the ends of justice”

35. Essentially, the Supreme Court in the aforesaid cases has observed that where the termination of a workman is in contravention of Section 25-F, the relief for reinstatement with full back wages is not automatic. In the given facts and circumstances, even though the termination of the respondent-workman is in contravention to the prescribed procedure, it may be wholly inappropriate to reinstate the respondent with full back wages. In the present case, the respondent-workman was not appointed as a regular/permanent workman. His services were terminated way back in 1993. Substantial time has elapsed since then. Therefore, monetary compensation instead of reinstatement shall meet the ends of justice.

36. The Respondent-workman in its application under section 17-B of the Industrial Disputes Act, 1947 bearing C.M No. 29475/2018 has stated that he has recovered wages till 31.01.2016 and is not gainfully employed in any establishment from 01.02.2016 till date.

37. In view of the aforesaid, we do not find any infirmity in the impugned judgment, with respect to the findings of fact or on the legal proposition discussed by the Learned Single Judge. However, in view of the decisions of the Supreme Court as noted above, we deem it appropriate to mould the relief granted to the workman from reinstatement to 'compensation' of Rs.3,00,000/-.

38. We further impose cost of Rs. 50,000/- on the Appellant for prolonging the matter since 1995. The aforesaid amount shall be paid by the Appellant within a period of two months failing which the same shall be paid with an interest of 12% per annum.

39. The impugned award dated 27th November, 2015 and the order of the learned Single Judge is modified to the aforesaid extent and the appeal is disposed of in the above terms.

SANJEEV NARULA, J

S. MURALIDHAR, J

October 31, 2018

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